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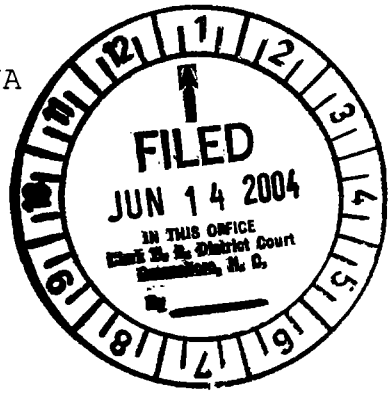
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



JOYCE L. BIUS,)
)
Plaintiff,)
)
v.) 1:02CV01120
)
THE HONORABLE TOMMY G. THOMPSON,)
Secretary of the Department of)
Health and Human Services,)
)
Defendant.)

MEMORANDUM OPINION

OSTEEN, District Judge

Plaintiff Joyce L. Bius brings this action against Defendant Tommy G. Thompson, Secretary of the Department of Health and Human Services, claiming violations of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, et seq. ("ADEA"). Now before the court are Defendant's motion for summary judgment, motion to strike Plaintiff's jury demand, and motion to strike affidavits offered by Plaintiff.

I. BACKGROUND

Plaintiff began her employment with the Department of Health and Human Services in 1978. She first worked as a Medical Coder, but was later promoted to Verifier and then Lead Coder. She served as Lead Coder until 1993, when she became a Medical Classification Assistant. In April 1997, Plaintiff's supervisor,

Charles Sirc, decided to promote her to a position as a Medical Classification Specialist. Throughout this time, including while serving under Sirc, Plaintiff received performance ratings of "Excellent" and often received an annual "Outstanding Performance Award." (Def.'s Mem. Supp. Mot. Summ. J. Ex. A-2 at 19.) In her role as a Medical Classification Specialist, Plaintiff was placed at a federal employee grade of GS-9 and was assigned to a Data Preparation Branch of the Centers for Disease Control, an arm of the Department of Health and Human Services.

From November to December 1997, two Medical Classification Specialist positions were advertised. Both could be filled at grades GS-7 or GS-9, with advancement opportunity to grade GS-11. Although Plaintiff already served as a Medical Classification Specialist, she applied for both positions due to their promotion potential. At the time she applied, Plaintiff was 52 years old.

An initial evaluator considered the credentials of the eight candidates who applied and rated their qualifications on a scale of one to four in three areas of Knowledge, Skills, and Abilities ("KSAs"). The KSAs sought were:

> (1) Ability to classify mortality data by both the underlying and multiple cause-of-death concepts according to the rules contained in the ICD-9, including providing technical assistance and adjudication for quality control purposes. (MANDATORY)
>
> (2) Ability to present materials in a formal classroom setting clearly and concisely. (MANDATORY)

(3) Ability to operate a personal computer to include the operation of standard programs, the trouble shooting of problems and the installation of software packages. (DESIRABLE)

(Id. Ex. A-1 at 2.)

Of the eight candidates evaluated, only four, including Plaintiff, received a total score of at least nine, the minimum required to be interviewed. Plaintiff received a total score of nine; each of the other applicants selected for an interview received scores of eleven. (Id. Ex. F-1.) Plaintiff's lowest individual KSA score was two, received in the second, "ability to present" category. (Id.) This was the lowest individual KSA score given to any of the four applicants receiving an interview.

The interviews were conducted by Plaintiff's supervisor, Sirc, who selected two senior trainers, Tanya Pitts and Julia Raynor, to assist him. Following the interviews, the three supervisors unanimously agreed to select Tyringa Ambrose and Pamela Stephenson for the positions. Both women were 31 years old at the time of their selection.

Plaintiff claims that she had more experience and training than Ambrose or Stephenson and, therefore, asserts that Defendant's failure to select her for either position was due to age discrimination. Defendant denies this charge, insisting that Plaintiff was not selected because she was less qualified to communicate effectively in a formal classroom setting. On July 30, 1998, Plaintiff filed a charge of age discrimination with the

Equal Employment Opportunity Commission ("EEOC"). Upon exhausting her administrative remedies, Plaintiff timely filed this lawsuit.

II. STANDARD OF REVIEW

Summary judgment is appropriate when an examination of the pleadings, affidavits, and other proper discovery materials before the court demonstrates that there is no genuine issue of material fact, thus entitling the moving party to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). If the non-moving party is to prevail, there must be more than just a factual dispute; the fact in question must be material and the dispute must be genuine. See Fed R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Although the court must view the facts in the light most favorable to the nonmovant, see Anderson, 477 U.S. at 255, 106 S. Ct. at 2513, summary judgment should be granted unless a reasonable jury could return a verdict in favor of the nonmovant on the evidence presented. McLean v. Patten Communities, Inc., 332 F.3d 714, 719 (4th Cir. 2003) (citing Anderson, 477 U.S. at 247-48, 106 S. Ct. at 2509-10).

III. ANALYSIS

Plaintiff claims that Defendant's failure to select her for the positions at issue constitutes a violation of the ADEA. The

ADEA provides that "it shall be unlawful for an employer . . . to fail or refuse to hire . . . any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1). A plaintiff may demonstrate a claim under the ADEA by one of two methods: she may produce direct evidence of age discrimination, or she may establish a prima facie case of discrimination as required under the McDonnell Douglas burden-shifting analysis. See, e.g., Goldberg v. B. Green & Co., 836 F.2d 845, 847-48 (4th Cir. 1988).

As direct evidence of the alleged age discrimination, Plaintiff seeks to establish a pattern of unlawful behavior. Plaintiff claims that, in 1998, Sirc hired or promoted seven employees, only one of whom was over the age of 40. Plaintiff admits, however, that her assertion is based only on the seven cases she happened to recall, including the two selectees at issue in this case. (Pl.'s Dep. at 62-63.) With regard to the other five selections, Plaintiff concedes that she does not know whether there was more than one applicant for the positions, who the selecting officials were in those cases, or whether other selections were made that year. (Id. at 62-63.) There is no evidence to indicate that older applicants were not selected for positions Plaintiff failed to recall, and no evidence that older applicants even applied for the positions Plaintiff did identify. The court cannot conclude from this evidence that a pattern of discrimination exists. Furthermore, Plaintiff's examples are too

few in number to indicate a pattern of discrimination. See Vaughan v. MetraHealth Cos., 145 F.3d 197, 203 (4th Cir. 1998) (finding that, in ADEA discriminatory discharge case, a sample of seven employees was "too small for reliable analysis"), overruled on other grounds by Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143, 120 S. Ct. 2097, 2106 (2000); Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 511 (4th Cir. 1994) (considering ADEA discriminatory discharge claim and indicating that samples of between five and thirteen are too small to have any predictive value).

As further direct evidence of discrimination, Plaintiff recounts several derogatory statements made by Sirc, including a comment that he preferred younger workers and a complaint about elderly people he encountered at a restaurant. (Pl.'s Dep. at 44.) Plaintiff, however, did not hear these comments; they were repeated to her by co-workers, the identities of whom she cannot recall. (Id. at 44, 46-47.) Accordingly, Plaintiff's own testimony on this matter is inadmissable hearsay and cannot be considered evidence of discrimination. See, e.g., Maryland Highways Contractors Ass'n v. Maryland, 933 F.2d 1246, 1251 (4th Cir. 1991) ("[H]earsay evidence, which is inadmissible at trial, cannot be considered on a motion for summary judgment."); see also Gaither v. Wake Forest Univ., 129 F. Supp. 2d 863, 868 (M.D.N.C. 2000) (stating plaintiff's own testimony regarding what

co-workers said they heard supervisor say was hearsay); cf. EEOC v. Northwest Structural Components, Inc., 822 F. Supp. 1218, 1220-22 (M.D.N.C. 1993) (denying summary judgment when plaintiff produced affidavits from several witnesses who testified that they heard the employer make discriminatory comments).

Since neither Plaintiff's purported pattern evidence nor her hearsay testimony regarding derogatory comments can be considered direct evidence of age discrimination, Plaintiff will only proceed to trial if she demonstrates a prima facie case under the McDonnell Douglas burden-shifting scheme. See, e.g., Causey v. Balog, 162 F.3d 795, 800 (4th Cir. 1998). To establish a prima facie case of discriminatory failure to hire or promote, Plaintiff must show (1) she is a member of the protected class;[1] (2) she applied for the positions in question; (3) she was qualified for the positions; and (4) she was not selected for the positions under circumstances that give rise to an inference of discrimination. See Gurganus v. Beneficial N.C., Inc., No. 01-1644, 2001 WL 1627655, at *1 (4th Cir. Dec. 19, 2001) (citing Carter v. Ball, 33 F.3d 450, 458 (4th Cir. 1994)); Venable v. Apfel, 19 F. Supp. 2d 455, 461 (M.D.N.C. 1998).

Since Defendant does not dispute that Plaintiff produced a prima facie case of age discrimination, see Def.'s Mem. Supp.

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[1] The Age Discrimination in Employment Act protects only individuals over the age of 40 from age-based employment discrimination. 29 U.S.C. § 631(a).

Mot. Summ. J. at 13-14, Defendant must, under McDonnell Douglas, rebut the presumption of discrimination by stating a lawful motivation for the employment decision. See, e.g., Stokes v. Westinghouse Savannah River Co., 206 F.3d 420, 429 (4th Cir. 2000); Causey, 162 F.3d at 801. At this stage, a defendant's burden is merely one of production; the employer need only "articulate some legitimate, nondiscriminatory reason for the employee's rejection." O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311, 116 S. Ct. 1307, 1309 (1996); see Causey, 162 F.3d at 800. If the defendant meets that burden, the presumption raised by the prima facie case is rebutted and the plaintiff then bears the ultimate burden of proving intentional discrimination. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-11, 113 S. Ct. 2742, 2747-49 (1993); Stokes, 206 F.3d at 429. To meet this burden, the plaintiff must show the employer's stated reason is merely a pretext for discrimination. Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000).

Defendant contends that Plaintiff was not selected for the positions in question because she was less qualified than the two applicants who were chosen. The three supervisors who conducted interviews, Sirc, Pitts, and Raynor, each found Plaintiff to be weaker than Ambrose and Stephenson in the second mandatory KSA area, "Ability to present materials in a formal classroom setting clearly and concisely." (Def.'s Mem. Supp. Mot. Summ. J. Exs. A

¶ 8, B ¶ 6, C ¶ 6.) Of four applicants interviewed, Plaintiff was also rated lowest in that area by the initial evaluator. (Id. Ex. F-1.) Plaintiff's weakness in this category was, according to Defendant, the reason she was not selected for either position. Since this explanation is not based on age, Defendant has produced a legitimate, non-discriminatory reason for the employment decision. See Evans v. Technologies Applications & Serv. Co., 80 F.3d 954, 960 (4th Cir. 1996).

In order to rebut Defendant's stated reason for failing to select her, Plaintiff must demonstrate that the reason given is a pretext for discrimination and is "unworthy of credence." Reeves, 530 U.S. at 143, 120 S. Ct. at 2106. Plaintiff insists that Defendant's explanation is obviously pretextual because Plaintiff believes she was well-qualified for the positions. (Pl.'s Dep. at 25.) This argument is not persuasive since Plaintiff's own opinion of her qualifications is irrelevant. See Smith v. Flax, 618 F.2d 1062, 1067 (4th Cir. 1980); Riley v. Technical & Mgmt. Servs. Corp., 872 F. Supp. 1454, 1461 (D. Md. 1995), aff'd per curiam, 79 F.3d 1141 (4th Cir. 1996). Plaintiff also offers affidavit testimony from two co-workers, both of whom claim that Plaintiff was qualified for the job. This assessment by Plaintiff's co-workers "is close to irrelevant." DeJarnette v. Corning Inc., 133 F.3d 293, 299 (4th Cir. 1998) (quoting Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231, 235 (4th

Cir. 1991)). Only the employer's evaluation of Plaintiff's qualifications is relevant. See, e.g., Hawkins v. PepsiCo, Inc., 203 F.3d 274, 280 (4th Cir. 2000); Smith, 618 F.2d at 1067.

Plaintiff also argues that Defendant's proffered reason for the selection is rebutted because it is inconsistent with the evidence. Plaintiff asserts that her many years experience and her several courses in various communication skills demonstrate that she was well-qualified for the positions. This evidence does not, however, prove that Plaintiff was as well-qualified as the two applicants selected. See Evans, 80 F.3d at 960 ("In a failure to promote case, the plaintiff must establish that she was the better qualified candidate for the position sought."). But cf. Dennis v. Columbia Colleton Med. Ctr., Inc., 290 F.3d 639, 648 n.4 (4th Cir. 2002) (stating that plaintiff would not have to prove she was the most qualified applicant if she could otherwise show that employer's proffered reason was pretextual).

Although Plaintiff has a high school diploma, two years of college, and numerous hours of training in presentation and teaching techniques, Def.'s Mem. Supp. Mot. Summ. J. Ex. A-2 at 17-18, she lacked both a college degree and prior work experience in a classroom setting. By contrast, Ambrose held a Bachelor of Arts degree and taught English for one year at the Wanchese Christian Academy; Stephenson held an Associate of Applied Science degree, a Bachelor of Business Administration degree, and

was certified as a substitute teacher in the Johnston County Public School System. (Id. Exs. A-3 at 2, A-4 at 2-4, B ¶¶ 7-8.) The supervisors' conclusion that Plaintiff was less qualified to provide instruction in a formal classroom setting is supported by the disparity in these credentials, which also caused the initial evaluator to rate Plaintiff last of the four candidates interviewed in this KSA category. The supervisors' determination is also bolstered by testimony that Pitts and several employees reported having difficulty communicating with Plaintiff. (Id. Exs. A ¶ 8, B ¶ 6.)

This evidence is not, as Plaintiff claims, inconsistent with Defendant's employment decision; rather, it supports Defendant's contention that Plaintiff's communication skills were inferior to those of the applicants selected. Further, that Plaintiff had worked at the Department of Health and Human Services for a greater number of years and received numerous commendations for that work does not rebut Defendant's proffered explanation. Despite her many years experience, Plaintiff's work had not involved any formal teaching.[2] It is not inconsistent to

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[2]Plaintiff's communications primarily involved informal instruction delivered in a one-on-one setting, such as the provision of technical support via telephone. (Pl.'s Br. Opp'n Mot. Summ. J. at 13-14.) It also appears that Plaintiff had some difficulty expressing herself effectively in this setting, eliciting several complaints from other employees. (Sirc Dep. at 154-55.) Although Plaintiff disputes this evidence, her relative strength or weakness in one-on-one communications is still not

(continued...)

conclude from this evidence that Plaintiff, though qualified for the positions, was not as well-qualified to function effectively in a formal classroom setting as were the other candidates.

Plaintiff claims that her evaluations for the positions in question are not conclusive evidence because the supervisors considered her application "very briefly" and did not discuss her qualifications prior to her interview. (Pl.'s Br. Opp'n Mot. Summ. J. at 14-15.) Even taken as true, these allegations do not indicate that the supervisors harbored a discriminatory reason for not selecting Plaintiff. Although it may not be advisable to consider candidates' applications only briefly, that action does not necessarily imply a discriminatory selection process. This court "does not sit as a kind of super-personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination." DeJarnette, 133 F.3d at 299 (quoting Giannopoulos v. Brach & Brock Confections, Inc., 109 F.3d 406, 410 (7th Cir. 1997)). "[W]hen an employer articulates a reason for [failing to select] the plaintiff not forbidden by law, it is not [the court's] province to decide whether the reason was wise, fair, or even correct . . . ." Id.; accord Dugan v. Albemarle County Sch. Bd., 293 F.3d 716, 722 (4th Cir.

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[2](...continued)
probative of her ability to operate in a formal classroom setting, and, as such, does not directly contradict Defendant's stated reason for failing to select Plaintiff.

2002); Hawkins, 203 F.3d at 279. Accordingly, this court cannot second-guess the supervisors' determination that Plaintiff's teaching skills were less effective than those of her competitors simply because the conclusion was based on sources outside the applications, such as the interviews. Plaintiff's argument that the supervisors' decision was wrong does not demonstrate that the stated reason for it is a pretext for discrimination.

Plaintiff additionally argues that pretext is demonstrated by Sirc's attitude toward her.[3] Plaintiff stated:

> I had an intuitive feeling that Mr. Charles Sirc . . . would not want to select me. I had no definitive information to support this feeling other than I had not been invited to staff meetings and staff discussions since Mr. Sirc had been my supervisor. Also, he seemed to me to be indifferent to my work, training needs, equipment needs, and progress.

(Pl.'s Aff. at 1:17-21.) Plaintiff also states that Sirc was "dismissive" of her. (Pl.'s Dep. at 8.) This evidence gives no indication that Sirc's attitude was motivated by Plaintiff's age and suggests only that Sirc did not like Plaintiff. Even if true, this fact would not support an age discrimination claim. See Williams v. Cerberonics, Inc., 871 F.2d 452, 456-57 (4th Cir. 1989); Bradington v. IBM Corp., 360 F. Supp. 845, 854 (D. Md. 1973), aff'd per curiam, 492 F.2d 1240 (4th Cir. 1974).

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[3]As discussed herein, Plaintiff claims other employees told her that they heard Sirc make discriminatory comments. However, Plaintiff's own testimony on that point is hearsay and will not be considered evidence of pretext. See Gaither v. Wake Forest Univ., 129 F. Supp. 2d 863, 868 (M.D.N.C. 2000).

Plaintiff's testimony is also based entirely on speculation, as are affidavits she offers from two co-workers, both of whom claim that Sirc discriminated against "older women." (Glenn Aff. ¶ 5.) While one witness states that Sirc was "particularly negative toward older women," id. ¶¶ 5-6, the other alleges that "it was considered common knowledge that a women [sic] could only be promoted in [Sirc's] department if she was young and pretty." (Christmas Aff. ¶ 5.) These allegations are conclusory, speculative, do not appear to be based on personal knowledge, and provide no facts to support Plaintiff's claim. Such assertions are not sufficient to demonstrate pretext. See Causey v. Balog, 162 F.3d 795, 801 (4th Cir. 1998); Evans, 80 F.3d at 960, 962; Goldberg v. B. Green & Co., 836 F.2d 845, 848 (4th Cir. 1988).

Plaintiff's allegation that Sirc discriminated against her is further rebutted by the fact that Sirc promoted her in April 1997, just nine months prior to his decision not to select her for the positions at issue in this case.[4] See Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991) ("[I]n cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not

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[4]Plaintiff was also promoted in November 1999, approximately one year after she filed her discrimination charge with the EEOC. Plaintiff attained (and currently holds) the position of Medical Classification Specialist at federal employee grade GS-11.

a determining factor . . . ."); see also Tyndall v. National Educ. Ctrs., Inc., 31 F.3d 209 (4th Cir. 1994) (finding same factor to be determinative in Americans with Disabilities Act discrimination claim). Plaintiff has not demonstrated any age-based bias by Sirc and has not alleged any conduct by Pitts or Raynor that would suggest a similar bias. Accordingly, Plaintiff has failed to demonstrate pretext based on the supervisors' conduct.[5]

Having produced no evidence to show pretext, Plaintiff relies entirely on her own assertion that the selections were discriminatory. This allegation, standing alone, is "simply insufficient to counter unrebutted evidence of legitimate, nondiscriminatory reasons" for the selections. Dugan, 293 F.3d at 722 (citing Williams, 871 F.2d at 456). There is no evidence to suggest that age, as Plaintiff contends, rather than teaching experience, as Defendant contends, motivated the selection.

Plaintiff maintains that this determination cannot be made without impermissibly weighing the credibility of witnesses.

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[5]Discrimination is also more difficult for Plaintiff to demonstrate since the supervisors accused of unlawful conduct were also members of the ADEA's protected class at the time of the employment decision. See Love v. Alamance County Bd. of Educ., 757 F.2d 1504, 1509 (4th Cir. 1985); DeWitt v. Mecklenburg County, 73 F. Supp. 2d 589, 598 (W.D.N.C. 1999); Demesme v. Montgomery County Gov't, 63 F. Supp. 2d 678, 683 (D. Md. 1999) ("The fact that the decision makers were of the same protected class [as the plaintiff] suggests no discriminatory motivation.") aff'd per curiam, 208 F.3d 208 (4th Cir. 2000).

Although it is improper for courts to consider credibility at the summary judgment stage, see, e.g., Davis v. Zahradnick, 600 F.2d 458, 460 (4th Cir. 1979), credibility need not be weighed in determining whether Defendant has produced a legitimate reason for the employment decision. See Dugan, 293 F.3d at 722 (affirming summary judgment in favor of defendant when non-discriminatory reason was offered to show why plaintiff's hours were reduced and plaintiff failed to show evidence rebutting that reason); Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231, 235 (4th Cir. 1991) (same, where plaintiff failed to show evidence rebutting employer's non-discriminatory reason for firing him). The court has considered Plaintiff's evidence in the light most favorable to her and, given that the wisdom or fairness of the employer's decision may not be second-guessed, concludes that Plaintiff has not produced any evidence from which a reasonable jury could find Defendant's stated explanation to be pretextual.[6] Accordingly, Defendant's motion for summary judgment will be granted. Defendant's motion to strike certain

[6] This decision is in keeping with the EEOC's findings. That agency's Office of Equal Employment Opportunity investigated Plaintiff's formal complaint and found that Plaintiff established a prima facie case of age discrimination, the selecting supervisors articulated a legitimate, non-discriminatory reason for the decision, and Plaintiff failed to establish by a preponderance of the evidence that this explanation was pretextual. This decision was appealed and affirmed by the EEOC's Office of Federal Operations on September 25, 2002.

of Plaintiff's affidavits and motion to strike Plaintiff's jury demand are, therefore, moot and will be denied.

IV. CONCLUSION

For the reasons set forth herein, the court will grant Defendant's motion for summary judgment. Defendant's motion to strike affidavits submitted by Plaintiff and motion to strike Plaintiff's jury demand will be denied as moot. A judgment in accordance with this memorandum opinion shall be filed contemporaneously herewith.

This the 14th day of June 2004.

William L. Osteen
United States District Judge